Supreme Court of the United States

No. [illegible]

JAMES O. WALLACE,

Petitioner,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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to find for the defendant (Respondent herein), which opinion was rendered on December 5, 1958, will be found on page 214 of the record filed herein.

The opinion of the Supreme Court of Mississippi was rendered on April 25, 1960 and is reported in 120 Southern 2d, page 131 and is printed in Appendix A hereto, *infra*, page 25.

The order of the Supreme Court of Mississippi overruling the suggestion of error and denying a rehearing, thus making its judgment final, dated May 16, 1960 will be found in Appendix B hereto, page 36, *infra*.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28 of the United States Code, chapter 81, Section 1257 (3). Rule 19, 1 (a) of the Revised Rules of the Supreme Court of the United States governs the class of case presented here.

The Federal statute involved here is the Federal Employers' Liability Act, 45 United States Code Annotated, Section 51, page 150, which reads as follows, to-wit:

> "Section 51. Liability of Common Carriers by Railroad in interstate or foreign commerce for injuries to employees from negligence; definition of employees.
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Terri-

tories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

The judgment of the Supreme Court of Mississippi was rendered on April 25, 1960. A suggestion of error was timely filed and the suggestion of error was overruled and a rehearing denied on May 16, 1960. A copy of the judgment and a copy of the order overruling the

suggestion of error is attached to this petition as Appendix A and B, respectively.

QUESTIONS PRESENTED.

The sole question presented here is whether the Federal Employers' Liability Act applies to the facts in the case at bar, or stated in another form, was the activity being undertaken by the petitioner, at the time of his injuries, incidental to and part of his duties in interstate commerce, within the meaning of the 1939 amendment to the Federal Employers' Liability Act. (Second paragraph of the above quoted statute.)

STATUTE INVOLVED.

There is here involved the Federal Employers' Liability Act. Section 51. Title 45. United States Code Annotated.

STATEMENT OF CASE.

The petitioner was injured as a result of falling from the couplers of defendant's railroad cars in a train or long cut of cars in defendant's "Yale Yards", in Memphis, Tennessee, while using the cinder pathway in the yards enroute to the yard office and washroom. This accident occurred around Noon on October 26, 1956, prior to the installation by respondent of its new "Tennessee Yards" with underpasses for pedestrian traffic.

On October 26, 1956, the respondent owned and operated "Yale Yards", a large and busy railroad yard

It consisted of a north-bound main line, a south-bound main line and nineteen major yard tracks of great length. In the center of the yard there was a cinder path or walkway, crossing most of the tracks at right angles, providing access between the various points in Yale Yards and Jonah Avenue, a street adjoining the railroad yards and lying parallel to the tracks. Employees were forbidden to leave or enter the yards except by use of this cinder walkway, according to written instructions issued and posted by the respondent on its bulletin boards, evidence of which, in the form of a circular, was admitted in evidence and is part of the record (R-33). About one block distant from the intersection of the cinder pathway with Railroad (Jonah) Avenue, there is located the Yale Hotel, which had no bathing facilities. Here trainmen arriving in the Yale Yards from distant points lodged and took their meals. It was patronized exclusively by trainmen. In the center of the yards were the railroad buildings which included a yard office and the trainmen's bath house, provided and maintained by the defendant for the use of train crews arriving from the North and South in the Yale Yards. The cinder pathway was the means of ingress and egress to and from the railroad facilities from the Yale Hotel and other rooming houses adjoining the railroad yards (R. 108).

The road crews from the North had their home terminal in Thayer, Missouri and the trainmen on the South end of the line operated out of Amory, Mississippi as a home terminal. The Memphis terminal was known as the "away from home terminal". Long freight trains

arriving in Memphis from the North or South completed their journey in this yard. Trains were classified, made up, and broken up in this yard and it was the site of extensive yard switching operations. Trains stood on the mainline and other through tracks and blocked the cinder pathway habitually for long periods of time, as long as twelve hours (R. 31 and R. 127). Fifteen to twenty-five yard employees had to use the cinder pathway every time that there was a change of shifts on the yard jobs (R. 179). In addition, trainmen leaving and arriving on defendant's freight trains had to use the cinder pathway in crossing the yards and had to cross over several trains on numerous occasions upon entering or leaving the yards. The defendant, recognizing the hazards of employees not engaged as members of the crews of the trains standing over the crossing, having to cross such trains, which were standing and blocking their passage, held numerous safety meetings, attempting to arrive at a solution of the hazardous condition (R. 181). On October 31, 1945, the defendant issued instructions in the form of a bulletin, published and posted on its property, requiring the responsible employees to keep the crossing of the cinder path with these tracks cut, open and cleared for safe passage of employees and to refrain from allowing trains or long strings of cars to stand over and upon the cinder pathway. The bulletin was admitted in evidence and is part of the record. (R. 118).

On October 3, 1947, the defendant issued a printed circular of instructions, again requiring and ordering road crews entering the Yale Yards and Yale Yard

crews to keep the crossing cut and cleared for safe passage of employees. That bulletin was admitted in evidence (R. 122). These bulletins and circulars were delivered by mail to the representatives of all the crafts of employees working in the Yale Yards and to all representatives of all trainmen arriving in the Yale Yards, and were posted on the company's official bulletin board in the Yale Yards, and another bulletin (R. 33) ordered that the pedestrian traffic be concentrated on the cinder pathway in going to and from the yards so that rail traffic not be disturbed or uncoupled more than necessary and forbidding the use of any walkway other than the authorized path, so that the trains would not have to be broken up more than was necessary for safety of the employees.

Petitioner was a brakeman; he arrived on his train in the Yale Yards from Amory, Mississippi, around 9:50 A. M., on the date of his injuries. Having left his home early that morning and having eaten no breakfast prior to leaving Amory, he went in search of breakfast as soon as he had tied up his train, which had been pulled clear of the cinder path. Enroute to the Yale Hotel for his breakfast, he found long strings of cars blocking tracks 3, 1, and the south-bound main line. He crossed over between the cars in these trains, proceeded to the Yale Hotel, ate his breakfast, read a newspaper and went outside the hotel to observe whether or not the pathway had been cleared so that he might safely return to the yard to shave, bathe and recuperate himself in the company provided washroom and check the bulletin board, in accordance with the

rules of his employment (R. 27), for any important notices or changes affecting his return trip to Amory. He observed that the crossing was still blocked by several trains, some of them over a mile and a half in length and the ends of same being beyond his sight. He could not determine whether there was an engine attached to any of these long strings of freight cars. In this plight, the petitioner decided to wait until the crossing was cut or until the cars were moved away. It was petitioner's desire to shave, shower, change clothes in the company provided facilities and then return to the Yale Hotel to retire until called again for duty to return to Amory or to report for any emergency call. Trainmen laying over in Memphis were subject to 24 hour call to duty in the event of derailment, wrecks, fires or wash-outs, which occurred on the defendant's property. Faced with the necessity of obtaining his rest compelled under the rules of his employment (R. 45 and 46), but confronted with the hazard of crawling again over the couplers of long strings of cars, over which he had no control, and which were subject to being moved at any time, he decided to wait until the crossing would be cleared or opened. After about an hour's waiting (R. 27), he commenced his journey to the washroom and yard office and in doing so, had to cross over three long strings of cars on the south-bound main line, on track No. 1, and track No. 3. In proceeding to cross over the coupler between the cars in track No. 3, he slipped and fell to the ground, from which he sustained his injuries. Petitioner filed timely suit for damages for his injuries in the Circuit Court of Lee

County, Mississippi, where a jury was empaneled and sworn and heard the plaintiff's evidence. The respondent, at the conclusion of the plaintiff's evidence, made a motion for a directed verdict, chiefly on the grounds that the plaintiff, at the time of the accident, was not employed in interstate commerce. The learned trial judge sustained the motion and peremptorily instructed the jury to find for the defendant, but commented that the plaintiff had introduced sufficient evidence of negligence for that issue to be submitted to the jury:

> "And it is my opinion that if the proof in this case brought plaintiff under the Federal Employers' Liability Act, there is sufficient evidence of negligence for that to go to the jury, but I have concluded that the proof does not bring plaintiff under the Federal Employers' Liability Act....." (R. 214.)

From the order sustaining the motion for directed verdict and peremptorily instructing the jury to find for the respondent, dated December 5, 1958, (R. 216) the petitioner appealed to the Supreme Court of the State of Mississippi in due course for a reversal of the decision of the Circuit Court of Lee County. The trial court's decision was affirmed on appeal, April 25, 1960. Suggestion of error was timely filed and overruled and a rehearing denied by the Mississippi Supreme Court on May 16, 1960, from which decision the petitioner brings his case here, seeking a review.

REASONS FOR GRANTING WRIT.

First: The petitioner's entire cause of action has been aborted by the Supreme Court of Mississippi. This is not a case where a reversal is sought to merely rectify an error in the administration of the Federal Employers' Liability Act, or to disturb a finding of fact with regard to negligence questions under the Act. Here the state court has refused to allow a trial by jury to the petitioner and has denied the very coverage of the act to the petitioner. The basis of the court's opinion is found in the authorities relied on therein, viz., *Young v. New York, N. H. & H. R. Co.* (C.C.A., 2d, 1934) 74 F. 2d 251; *Quirk v. New York, C. & St. L. R. Co.* (C.C.A., 7th, 1951) 189 F. 2d 97; and *Sassaman v. Pennsylvania R. Co.* (C.C.A., 3d, 1944) 144 F. 2d 950.

The *Young* case was decided prior to the 1939 amendment extending the scope and coverage of the Act and presented facts dissimilar to the case at Bar. The *Sassaman* case, although before the Court of Appeals, 3rd Circuit, in 1944 was necessarily decided on the law applicable at the time of the injury which occurred in 1939, as evidenced by the following language of the court:

> "It seems clear from the facts which we have recited that the plaintiff failed to show that both he and his employer were engaged in interstate commerce at the time of the infliction of his injuries. It would follow, therefore, that a case

under the Federal Employers' Liability Act, prior to its amendment in 1939, is not made out by the record before us." *Sesraman v. Penn., Id.*

The facts in the case of *Quirk v. New York, C. & St. L. R. Co.*, decided in 1951, are vastly different from those presented here. There, the decedent, approximately three hours after he had quit work and left his place of employment and returned to his home in another town was enroute from his home to a third town to see his son play basketball, when he was killed in the collision of the track motor car he was operating with another motor car. No such far reaching proposition is sought to be sanctioned here.

The interpretation of the Federal Employers' Liability Act is a matter of federal law and federal decisions are controlling. *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L.Ed. 1282 (1949), and it has been said by this court, "The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded men cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers v. Missouri-Pacific Railroad Company*, 320 U.S. 500, 77 S.Ct. 443 (1957).

The Supreme Court of Mississippi has always given a markedly restricted interpretation to the coverage of the Federal Employers' Liability Act and to the questions of engagement in interstate commerce regardless of federal decisions to the contrary. *Gulf, M. & N. R. Co. v. Myer*, 145 Miss. 555, 110 So. 444 (1926). Further erosion of the principles above referred to was done at the hands of the court in the case at bar and again, subsequent to the instant decision, *James E. Hill v. Gulf, Mobile & Ohio Railroad Company*, 120 So. 2d 157 (1960).

Second: The Supreme Court of the State of Mississippi is the court of last resort and its erroneous decision in this case may be properly cited as authority construing the Federal statute, unless this writ be granted. The decision is contrary to the decisions of the various United States Courts of Appeals.

The petitioner testified concerning his duties and his interpretation of certain rules of the respondent company contained in its rule book, which rules were admitted in evidence (R. 46 and 47), that he was required by these rules to use his time off duty primarily for obtaining ample rest (R. 46), that he was returning to the company facilities, to shave, take a shower and ready himself for such rest and to check with the call boy (R. 27) and check the bulletin board (R. 46). Notwithstanding this testimony, the Mississippi Supreme Court held: . . . . . "He was engaged in no activity which, in any way directly or closely

and substantially affected such commerce. Page 6, Opinion of the Supreme Court of the State of Mississippi, Appendix A, herein. There now exists a conflict between the decision of the highest court of appeals of the State of Mississippi and that of the various United States Courts of Appeals

In 1950, the United States Court of Appeals, 4th Circuit, held that where a brakeman was led reasonably to believe that he was required to report to his conductor as soon as possible after putting his engine away after the completion of his trip and the railroad company had acquiesced in his practice of leaving the railroad yards to do so, the leaving of the yards in an attempt to make the report could not break the continuity of interstate activity so as to remove him from protection of the Federal Employers' Liability Act in regard to an injury received by him while he was thereafter attempting to return to the company's washroom. *Atlantic Coast Line Railroad Company v. Craven*, 185 F. 2d 176 (1950). Likewise, the United States Court of Appeals for the 3rd Circuit has held that an employee who went to another town to attend a company sponsored bond rally, but who did not attend the rally, but went in search of his supervisor for want of information concerning a bond that had not been delivered to him was in the course of his employment when injured while crossing the tracks in the other town. *Healy v. Pennsylvania Railroad Company*, 184 F. 2d 209 (1950).

In the 9th Circuit, it has been held in a case where the breakfast hour was 6:45 A. M. and the work hour was 8:00 A. M. and an employee was crossing the railroad yards going to the toilet prior to breakfast and about an hour and one half before he was to begin work and was struck and killed, he was deemed within the coverage of the Act and within the scope of his employment. *Chicago M. St. P. & T. Railroad Company v. Kane*, 33 F. 2d 866 (1929).

The United States Court of Appeals for the 2nd Circuit, in 1947 held that where an employee who was sleeping in a company camp car and who had done no work for the railroad company for 24 hours prior to his injury, but because of the conditions of the camp car being unfit for habitation he was forced to sleep outdoors and who lost his leg when run over by a train while he was sleeping on the track was engaged in interstate commerce and was within the scope of his employment at the time he was injured. The court stating:

> "It seems to us that when a railroad provides shelter or food or both for its employees and they are using the accommodations so provided to prepare themselves for work or to rest and recuperate, they must be regarded as in its employ." *Mostyn v. Delaware L. & W. Railroad Company*, 160 F. 2d 15 (1947). Certiorari denied by the United States Supreme Court, 68 S. Ct. 82 (1947).

Third: The decision in the case at bar creates a conflict between it and the decisions of the United States Supreme Court on a matter of federal law of great im-

portance to employees of railroads throughout this country.

The United States Supreme Court, even prior to the 1939 amendment and the decisions interpreting the amendment, gave a liberal interpretation to the feature of the Act now before the Court. In the case of *North Carolina Railroad Company v. Zachary*, 232 U. S. 248, (1913), a fireman left his engine to return to a boarding house on a mission of his own and was injured while returning to the railroad yards. It was held that he was within the coverage of the Act.

Although the *Zachary* case occurred prior to 1939 and prior to the decisions interpreting the 1939 amendment, the decision in that case broke the barrier of the "moment of injury" or "pin point" theory and the court proceeded to carry out the humanitarian purposes of the Act.

Later, in 1916, the United States Supreme Court, through Mr. Justice Van Devanter, in the case of *Erie Railroad Company v. Winfield*, 244 U. S. 170, 37 S. Ct. 221, 72 L.Ed. 507, granted certiorari to review the judgment of the Supreme Court of New Jersey in holding that compensation was due a dependent of a railroad worker under the state Workmen's Compensation Act. This court reversed the decision of the New Jersey court and held that the deceased was engaged in interstate commerce at the time of his fatal injury, stating:

> "The accident in the present case happened just after the decedent had left his engine and was

starting to walk home across the tracks in the railroad yard. If suit had been brought under the federal statute on the theory that the accident was due to some negligence on the part of the defendant or its officers, agents or employees, we submit that the federal statute would have been held applicable on the ground that the accident happened while the decedent was still on duty."

Thus, even before the 1939 amendment, this Court had, whenever the question before it now had been presented, given a liberal interpretation to the question of whether the employee was engaged in interstate commerce and in the employ of the railroad company in going to and from work. Unfortunately, however, the precise question presented in the case at bar seems to have never been squarely presented to this Court, although close and analogous cases have been decided by the United States Courts of Appeal and by the various highest courts of the individual states, and such decisions are favorable to the petitioner and in conflict with the holding of the Mississippi Court in the case at bar.

Petitioner concedes that in the two cases cited above the facts were not the same, but it is submitted that there is no difference in principle between the cases of an employee temporarily departing from duty or in the process of walking home after duty, from the railroad yard and the case at bar, in which the petitioner was detained from re-entering the yards and ultimately leaving them for his place of abode directly

as a result of the delay occasioned solely by the respondent in blocking his crossing.

Fourth: Through the years there has arisen a conflict of decisions of the highest courts of the various states on the federal question involved herein and various interpretations have been given to the 1939 amendment. In the case of *Easter v. Virginian Railway Company*, 86 S. E. 37 (1915) the plaintiff's duties ended when he completed his trip on his interstate train and tied up the train in the yard. However, it was held that the cessation of active work did not terminate the relationship of employer and employee and that when he was injured an hour and a half later, while going to his lodging place, that he remained in the employ of the railroad and was engaged in interstate commerce at the time. Although that case was decided prior to the 1939 amendment, the court held that the relationship continued, "for a reasonable time thereafter to enable such employee to wash himself and change his soiled clothing in the caboose provided with the conveniences therefor, before going to his lodging place", such being the custom of trainmen. There was evidence in that case that another employee was cooking a meal in the caboose, after arriving in the yard and that the plaintiff partook of the food before leaving his place of work.

In another case decided in a state court, the plaintiff was a track worker and was staying in the shanty furnished by the defendant railroad company. The plaintiff, by working New Year's Day, was able to get in 40 hours work by 6:00 P. M. on Thursday night and was

told that he could be off from work until Monday morning, although he was subject to call 24 hours per day, as in the case at bar. He missed a train that would take him to his home on Friday morning. He and a fellow worker went to a picture show, got some fruit to eat, and they returned to the shanty car on Friday night, about 10:00 P. M. to rest and wait for transportation home the next day. He had been off work for more than 24 hours. The court required that the questions as to "scope of employment" be determined by the jury and the jury returned a verdict in Meeks' favor. *Atlantic Coast Line Railroad Company v. Meeks*, 208 S. W. 2d 355 (1947).

A vastly different and extremely conservative interpretation was given to the question of engagement in interstate commerce in the case of *Atlantic Railroad Company v. Stinson*, decided in the Supreme Court of Alabama in 1955, 88 Southern 2d, 189, wherein an engineer, during his tour of duty, left his engine and went to the dining car of a work train to eat and whose body, cut in half, was found on the track after he was last seen in the diner, about three-fourths of a mile from where his body was found, and about two hours after he was last seen, apparently enroute back to his engine. The court held that in going to the diner, the engineer was acting within the scope of his employment and that his next duty would be to return from the diner to the engine. But the court stated, "We can only speculate as to what proximately caused Stinson's death and if it was in the course of his employment, there being no duty of Stinson to perform which we can infer that he

was doing when he was struck by the movement of the train."

In *Hill v. Gulf, Mobile & Ohio Railroad Company*, 120 S. 2d 157, decided by the Supreme Court of Mississippi May 2, 1960, wherein a switchman returned to the depot with a fellow employee about one hour after the plaintiff had been off duty in order to make a telephone call to resolve a working rule interpretation to assist the railroad company in the proper placement of the men on the job for the next day's work and was assaulted by the fellow employee. The court held that the plaintiff was not engaged in interstate commerce or in the furtherance of interstate commerce and that there was no liability under the Federal Employers' Liability Act. The case, together with decisions of our present conflicts in interpretation of the Act by the various state courts.

In both the *Hill* case and the present case, the negligence charge was the failure to furnish a safe place to work; in the case at bar, in the specific failure to provide access to and from the railroad yards and company facilities by a safe passage and the negligent violation of the carrier's own specific instructions in that regard, that is, the failure to cut and keep open and clear the passage or cinder pathway; in the *Hill* case, the direct negligence of the railroad company in failing to discharge a known, dangerous employee whose viciousness had matured in the employment with the knowledge of the railroad company on several occasions prior to the plaintiff's injuries.

Fifth: Thousands of railroad workers throughout the United States may be deprived of their entire cause of action if the erroneous decision is permitted to stand. Railroading is a hazardous occupation. Congress has recognized this in the enactment of the Federal Employers' Liability Act, the Safety Appliance Act, the Boiler Inspection Act and in other statutes imposing a duty on the railroad far more stringent than the common law duty owed by a master to the servant. Chiefly because of the hazardous nature of the occupation, railroading requires alertness and physical agility on the part of the men who handle the trains. Recognizing this, various railroads throughout the country have installed in their away from home terminals facilities for proper rest and recuperation of their trainmen. Obviously these facilities cannot be used while the men are engaged in active work and invariably are used at the conclusion or termination of their duties, or prior to entering their duties of the day. Most of such facilities are located on the railroad grounds or in its yards. Daily, such facilities are being used by railroad men on the various railroads throughout the United States. The railroad not only acquiesces in the practice of their washing-up, resting, lounging and recuperating upon its property, but erects facilities and encourages the use of them by their employees. In such a situation, what is to happen to the employee who is injured while using or enroute to use such facilities when, through the negligence of the railroad company, such an employee is injured or killed? Is liability to be avoided on the thin line or arbitrary element of the amount of time involved between beginning or cessation of active work

and the use of the facilities? Wherein can it now be said under the present maze of confusion of the decisions interpreting the Act that an employee's protection under the Act begins or ends. Clearly, if the petitioner had used the wash room first, as was said in *Atlantic Coast Line Railroad Company v. Craven*, id. and had been detained in leaving the railroad yards to obtain food and rest by the same length of time and by the same negligent blocking of the cinder pathway, he would have been covered under the Act. What real distinction lies in the fact that he was some 25 yards away on the opposite side of the tracks, attempting to use the company's wash room, and was injured in perhaps the same place he would have been injured had he been going in the opposite direction at the same time, in crossing from the yards to the Yale Hotel. In both situations negligence of the railroad company in blocking the crossing would have been the cause and the injury the effect.

Sixth: "Undue and unusual hardship will result to the petitioner if certiorari be not granted. At the time of his injuries, petitioner was 40 years of age, with a life expectancy of 31.17 years; and an annual earning of $6,000.00 with full rights of seniority and promotion and increase in wages in his employment as brakeman with the defendant. Because of his injury, it was necessary that he have a surgical operation performed on his back, wherein a ruptured disc was removed and following the surgery, he was advised and his doctors so testified that he would have a permanent disability of 15 per cent and would continue to suffer pain for the

balance of his life and his earning capacity would be impaired as a result of his injuries. He has continued to suffer a wage loss of about 20 per cent and must sustain such a loss as a permanent proposition. He has incurred costs of medical care, hospital bills, drugs, and appliances and although he has commendably rehabilitated himself in the employment to the extent that he is able to work with his injured back, will doubtless incur further drugs and medical costs for the balance of his life, and is continuing to lose a portion of his wages.

The medical testimony further showed that the disability in petitioner's back would probably increase with age and that his mobility would decrease gradually. Great economic loss has occurred and will in the future be sustained by petitioner and his family. Not unlike his peers, he discovered even prior to his injury, that the maximum wages he could earn in his employment were just about equal to the cost of living. Needless to say, since his injury he cannot meet such costs and he and his family must be deprived of the necessities they enjoyed prior to the practice upon him of the respondent's negligence. What possible source is there to supply the deficit? For almost four years now, at great expense and personal sacrifice, this petitioner has been seeking to have his grievances justly settled through trial by jury, as provided for by the Congress. Reliance was naturally placed by the petitioner on the decisions of the Supreme Court of the United States and those of the United States Courts of Appeal. A costly jury trial and a costly appeal to the state Supreme

Court, plus the cost of court (tremendous to him) have paralyzed his ability to support his family and himself.

CONCLUSION.

For the foregoing reasons and to enable the accomplishment of a clear interpretation of the coverage of the 1939 amendment to the Federal Employers' Liability Act and to enable the accomplishment of justice under the law, this Petition for Writ of Certiorari should be granted.

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this court, directed to the Supreme Court of the State of Mississippi, commanding said court to certify and send to this court, a transcript of the record in the case entitled *James O. Wallace versus St. Louis San Francisco Railway Company*, No. 41,341, including also the proceedings in said Supreme Court to the end that said cause may be reviewed and determined by this court and the judgment of the Supreme Court of Mississippi and the Circuit Court of Lee County, Mississippi be reversed here, and the cause remanded for a new trial.

Respectfully submitted,

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APPENDIX A.

IN THE SUPREME COURT OF MISSISSIPPI

No. 41,341

JAMES O. WALLACE

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

KYLE, JUSTICE.

The appellant, James O. Wallace, sued the appellee, the St. Louis-San Francisco Railway Company, under the Federal Employees' Liability Act, for damages for personal injuries alleged to have been sustained by the appellant while engaged in the performance of his duties as an employee of the defendant on October 26, 1956.

The plaintiff alleged in his declaration that the defendant on that date was engaged in the furtherance of interstate commerce in the movement of freight by rail from the State of Mississippi to other states; that the plaintiff was employed as a brakeman on the defendant's railroad between Amory, Mississippi, and Memphis, Tennessee, and as such brakeman, was required to use certain paths on the defendant's railroad yards in Memphis, in going to and from his work; that, while plaintiff was using such pathway provided by the defendant in its yards, going to the washroom provided by the defendant to wash up, plaintiff found that

the defendant had negligently allowed and permitted several of its freight trains or long strings of cars to remain standing on the railroad tracks in said yards, blocking the crossing and preventing the use by the defendant's employees of the pathway to go to said washroom; that the plaintiff found it necessary to cross over between said cars, and while doing so slipped and fell by reason of the dangerous and hazardous condition aforesaid, and permanently injured his back. The plaintiff alleged that the defendant was negligent in that it failed to exercise reasonable care to furnish the plaintiff with a safe place to work, which included incidental passage to and from the bathhouse provided for the use of the plaintiff and other employees; that the defendant violated its duty and its own rules of operation in negligently permitting the pathway provided by the defendant across its yards to become and remain blocked for a long period of time by trains or cuts of cars, thus preventing the proper and safe use of said passageway; and that the defendant's negligence in permitting the pathway to become and remain blocked was the proximate cause of the plaintiff's slipping and falling.

The defendant in its answer denied that the plaintiff at the time of his injury was an employee of the defendant or was engaged in the furtherance of interstate commerce in the movement of freight by rail; and the defendant denied the other material allegations of the declaration. The defendant in its answer averred that the plaintiff was off duty and not in the service of the defendant at the time of the alleged accident. The defendant also averred that the plaintiff was guilty of

gross negligence in climbing over or crossing through the alleged cut of railroad cars, and in selecting the way of returning from the Yale Hotel to the wash or locker room on the railroad yard, and that the gross negligence of the plaintiff was the direct and proximate cause of the plaintiff's injury.

The plaintiff testified that he lived in Amory, Mississippi, and had been an employee of the St. Louis-San Francisco Railway Company for a period of approximately 20 years. On October 26, 1956, he was holding the position as brakeman on a freight train which ran from Amory to Memphis, Tennessee, a distance of 124 miles. The conductor on the train was J. L. Duval, who also lived at Amory. The train left Amory at 3:00 o'clock A.M. and arrived at the Yale Yards in Memphis about 6½ hours later. The plaintiff and the conductor got off the train and went to the yard office, climbing over a cut of cars to get to the office. The members of the crew tied up the train and completed the active labor about 9:50 A.M. The plaintiff went immediately to the yard office and registered in the "bum book" or register provided by the defendant, and reported his "tie up time." After the plaintiff had registered on the "bum book" he left the office and went to the Yale Hotel, off the railroad yard on Trezevant Avenue, and registered for a room. There was a cinder path from the yard office to the street leading to the Yale Hotel which was used by the employees. When plaintiff left the yard office to go to the hotel this path was blocked by cuts of cars on three tracks and plaintiff climbed through three cuts of cars to reach the hotel, but this

occurred without incident. After registering at the hotel for a room the plaintiff ate breakfast, sat down and read the morning paper, and finally walked outside to see if the cars that were blocking the walkway had been moved. About 12:15 P.M. the plaintiff decided to return to the washroom on the railroad yard to shave and check with the call boy as to when he might be used and also check the bulletin board. He climbed over the cut of cars on the south beyond the main line, on the No. 1 track, and was attempting to cross the cars on the No. 3 track, when he slipped and fell. There was no movement of the cars when the plaintiff slipped and fell. The plaintiff then described in detail his injuries and the hospital and medical treatment which he had undergone as a result of his injuries.

On cross-examination, the plaintiff stated that he and the conductor signed out between 9:30 and 10:00 o'clock, and he had no further duties to perform in connection with the train. His next duties would be when he was called to take another train. The plaintiff stated that, when he signed the register at the yard office, he showed that he would be at the Yale Hotel. He was not supposed to be called back under eight hours. He was "on his own" until the call boy called him back; but he was supposed to for another assignment on short notice.

J. L. Duval, who testified as a witness for the plaintiff, testified that after the trainmen signed the register at the end of a run they were free to go to their places of lodging, and were subject to no further duties until they

were called. According to an agreement between the railroad and the Brotherhood, they would not be called prior to eight hours unless there was an emergency due to a wreck or a washout. After a trainman got off the yard he was "on his own", until notified by the call boy to come back to work. He must then have one hour and forty minutes notice. He was supposed to familiarize himself with the circulars and bulletins before the beginning of each trip. The rule required that he do that; but that was usually done just before the train pulled out. Duval stated that a trainman had no occasion for having to look at the bulletin board to see when he was going out, except for his own personal plans. A trainman was not required to go to the caller's office and look at the bulletin board to get his name on the list to be called.

At the close of plaintiff's case the defendant made a motion for a peremptory instruction on the ground that the plaintiff's evidence showed that the plaintiff was off duty at the time of the accident and had left the defendant's premises, and that the defendant was under no duty to furnish him a safe place to work because he had no work to do. The court sustained the motion and directed a verdict for the defendant, and judgment was entered thereon. From the judgment the plaintiff has prosecuted this appeal.

The Federal Employers' Liability Act, as amended by the Act of August 11, 1939, 45 U.S.C.A. Sec. 51 et seq., provides in part as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States

or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

It is fundamental that the interpretation of this act is a matter of federal law and that federal decisions are controlling. *Erie v. Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282.

The first point argued by the appellant's attorneys as ground for reversal of the judgment of the lower court is that the court erred in sustaining the appellee's motion for a directed verdict and refusing to submit to the jury the question of whether or not the plaintiff was employed in interstate commerce at the time of the accident in question.

But we think there was no error in the court's refusal to submit to the jury the question of whether or not

the plaintiff was employed in interstate commerce at the time of his injury. There was no dispute as to any material fact, and we agree with the court below that the question for decision is one of law. *Quirk v. New York, C. & St. L.R. Co.* (C.C.A. 7th, 1951), 189 F. 2d 97. From the testimony of the plaintiff and the plaintiff's witness, J. L. Duval, it seems clear to us that the plaintiff's injury did not arise out of his interstate activities or the performance of any duties in furtherance of interstate commerce. The activity undertaken by the appellant, when he returned to the railroad yard at 12:15 P.M., was an activity undertaken for a purely private purpose. The appellant was performing at the time no duties as an employee "in furtherance of interstate or foreign commerce. He was engaged in no activity which, "in any way directly or closely and substantially," affected such commerce. He was performing no service for his employer. He was neither going to nor coming from the job at the time of his injury. He was neither engaged in rendering actual service to the railroad company, nor in doing the things necessarily incident thereto.

It is no longer doubted that the Employers' Liability Act extends to and covers not only the actual work performed in interstate commerce, but those acts which can be said to be necessarily incident thereto. Thus, an employee is working in commerce while going to and from his actual place of work after reporting for duty. *Lukon v. Pennsylvania R. Co.* (C.C.A. 3rd 1942), 131 F. 2d 327. And, the act covers 'temporary depar-

tures from his line or course of duty, as where a fireman, after oiling, firing and preparing his engine for an interstate journey, temporarily left his engine to go to his nearby boarding house and was struck while on the railroad premises. *North Carolina R. R. Co. v. Zachary*, 232, U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. But, given its most liberal interpretation, the act cannot be extended to cover activities not necessarily incident or of an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment. *Young v. New York, N. H. & H. R. Co.* (C.C.A. 2d 1934), 74 F. 2d 251; *Young v. New York, N. H. & H. R. Co.* (C.C.A. 2d 1935), 79 F. 2d 344; *Sassanian v. Pennsylvania R. Co.* (C.C.A. 3d 1944), 144 F. 2d 950; *Quirk v. New York C. & St. L.R. Co., supra.*

It is argued, however, on behalf of the appellant that, although the nature of the activity in which he was engaged at the time of his injury may have partaken of the character of a personal mission of his own, the activity was of such nature as might properly be deemed to have been incident to his duties in interstate commerce. But that argument is, in our opinion, wholly untenable, and finds no support in the authorities cited by the appellant's attorneys in their brief.

The appellant in this case, as in *Young v. New York N.H. & H.R. Co.* (C.C.A. 2d 1934), 74 F. 2d 251, had ceased working two hours before the accident occurred, as a result of which he suffered his injury. His pay had

ended. He had no further duties to perform until called to brake another train; and he was not supposed to be called again under eight hours, unless there was an emergency, that is to say, a wreck or a washout. The appellant, at the time of his injury, according to his own testimony, was returning to the railroad washroom to shave. As stated by the Court in the *Young* case, in commenting on the plaintiff's wish to go by Cedar Hill to change his clothes, "Certainly the defendant had no conceivable interest in this * * *." The opinion in the *Young* case was written by Judge Learned Hand; and in the later case of *Mostyn v. Delaware L. & W.R. Co.* (C.C.A. 2d 1947), 160 F. 2d 15, which was decided several years after the enactment of the 1939 amendment to the Federal Employers' Liability Act, Judge Hand said: "We hold, as we did in *Young v. New York, N.H. & H.R.Co., supra*, that any activity undertaken by an employee for a private purpose is certainly not within his employment." See also *Young v. New York N.H. & H.R.Co.* (C.C.A. 2d 1935), 79 F. 2d 844; *Quirk v. New York, C. & St. L. R. Co., supra*; *Atchison T. & S.F.R. Co. v. Wottle* (C.C.A. 10, 1952), 193 F. 2d 628.

This case is entirely unlike the case of *Atlantic Coast Line Railroad Co. v. Craven* (C.C.A. 4th 1950), 185 F. 2d 176, cited in the appellant's brief, in which the brakeman, having been led to believe that he was required to report to his conductor as soon as possible after putting the engine away at the completion of an interstate trip, left the railroad yard in an attempt to

make such report and was injured while attempting to return to the railroad washroom. This case is also entirely unlike the cases of *Atlantic Coast Line R.R. Co. v. Meeks*, 1947, 30 Tenn. App. 520, 208 S.W. 2d 355; *Mostyn v. Delaware L. & W. R. Co.* (C.C.A. 2d 1947), 160 F. 2d 15; and *Casso v. Pennsylvania R. Co.* (C.C.A. 3rd 1955), 219 F. 2d 303, in which the injured employees were section hands or track workers housed in shanties or bunk cars furnished by the employers and subject to call when not actually in service.

A summary of the decisional law on the points presented for consideration by us on this appeal is stated by the textwriter in 35 Am. Jur., 861, Master and Servant, par. 445, as follows: "An employee whose regular service is a part of interstate commerce is within the protection of the Federal Employers' Liability Act while traveling on the company's property to begin his work, while awaiting the actual work time to begin after reaching the place to which he has been assigned, and while leaving the company's property on his way home, after his interstate work is completed. Also, if the work in which the employee is engaged is interstate commerce, he is protected while going from one job to another. In any case, however, the work in which the employee was to engage must be shown to be interstate commerce; there can be no recovery if the employee was using the yards or tracks for purposes of his own, unless such use is so incidental to his employment that it can be regarded as a part thereof."

We think it is clear from the testimony of the appellant and his witness J. L. Duval, that the appellant in this case was not acting within the scope of his employment at the time he received his injuries, and that the appellant's use of the railroad yards and tracks at that time was not so incidental to his employment that it can be regarded as a part thereof. We must therefore hold that the appellant was not employed in interstate commerce at that time, and that the appellant did not have a right of action under the Federal Employers' Liability Act at the time the suit was filed. Cf. *Young v. New York, N.H. & H.R.Co.* (C.C.A. 2d 1934), 74 F. 2d 251; *Young v. New York, N.H. & H.R. Co.* (C.C.A. 2d 1935), 79 F. 2d 844; *Bishop v. Delano* (C.C.A. 7th), 265 F. 263, certiorari denied, 254 U.S. 632, 41 S. Ct. 7, 65 L. Ed. 448; *Sassaman v. Pennsylvania R. Co., supra.*

The judgment of the lower court is therefore affirmed.

AFFIRMED.

ALL JUSTICES CONCUR EXCEPT ROBERDS, J. WHO TOOK NO PART

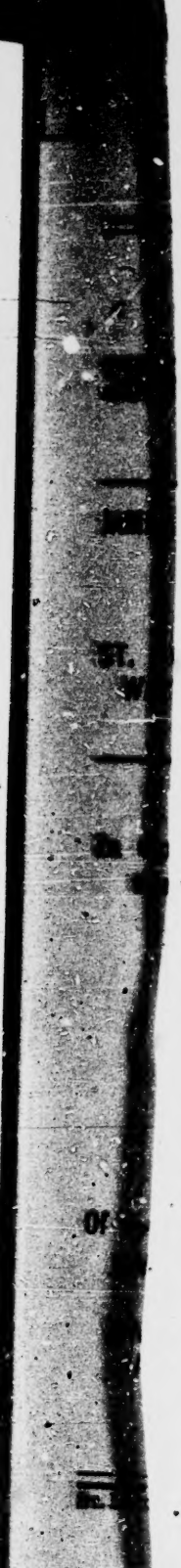
APPENDIX B.

Monday, May 16th, 1960. Court Sitting.

James O. Wallace
41,341 Vs
St. Louis-San Francisco Ry. Company

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

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COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

JAMES O. WALLACE,
Petitioner,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

No. 280.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

JAMES O. WALLACE, Petitioner, v. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Respondent.	No. 280.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi.

The writ of certiorari applied for in this case should not be granted for the following reasons:

(1) The Federal question involved has been determined heretofore by this court.

(2) The state court has not decided this case in conflict with the applicable decisions of this court, but to the contrary has decided it in accord with such decisions.

(3) The review of the matter by this court would amount to nothing more than a second appeal for the petitioner and would have no special and important significance.

I.

STATEMENT OF THE CASE.

We do not think the statement of the case contained in the brief of petitioner presents a full and well-rounded statement of the facts. It fails to state the important facts as shown by the evidence in the case that at the time of the injury complained of, the plaintiff had completed his work with the railroad, had been off duty for more than two hours, had gone off of the railroad premises, and was undertaking to come back on the railroad premises on a mission of his own. The opinion of the Supreme Court of Mississippi contains a good statement of the facts in this case and we refer to it instead of undertaking to make a statement for the respondent. Copy of the opinion of the Supreme Court of Mississippi will be found in Appendix A to this brief.

II.

REPLY TO REASONS FOR GRANTING WRIT.

First: Petitioner's complaint is that the court denied the right to a trial by jury which was provided by the Federal Employer's Liability Act. The act gives the right of trial by jury on issues of negligence and the court has held that where, from the facts or from a controversy as to facts, fair minded men may reach different conclusions as to whether or not the acts constituted negligence, the issue must be submitted to a jury; but the court has also without exception held that where there is no basis for the finding of negligence, the court will not submit the matter to a jury.

Both of the lower courts in this case have held that there was no basis for the finding of negligence. The claim of negligence in this case is not based on some active force

exerted or controlled by the defendant from which the injury was suffered by the plaintiff. His claim is based on failure to do what he contends the defendant was under obligation to do, and from this claims negligence.

The negligence claimed by him is failure to furnish a safe place in which to work. The courts below held that the plaintiff was not doing any work for the defendant at the time of the injury and therefore the defendant was under no obligation to provide him a safe place in which to work. The plaintiff stated, on page 73 of the record, numbered according to the Supreme Court of Mississippi, as follows:

> "I was off duty when this accident occurred. The accident occurred about 12:15 P. M., or just after noon."

His testimony was that he had signed the register and went off duty about 9:30 to 10:00 o'clock, went off of the railroad premises to a private hotel and engaged a room, ate his breakfast, sat around and read the newspaper and after about two hours undertook to go back on the railroad premises on a mission of his own, to wit, that of shaving in the wash room on the railroad yards.

The court below did not deny the plaintiff the right of trial by jury to determine the negligence of the defendant, but held that no basis for negligence had been shown in that the plaintiff's own evidence showed that he was not on duty and was under no employment whereby the defendant was under any obligation to provide for him a reasonably safe place in which to work. Failing to show the obligation, he failed to establish a basis for negligence which would have to arise from such obligation. There was no claim of any defect in the cars, tra' s or equipment of the defendant through which the plaintiff undertook to pass and in doing which he fell and suffered his injury. His sole basis for claim is that the defendant was

negligent in failing to furnish him a safe place in which to work at a time when he was under no duty to work and had no work to perform.

Petitioner contended in the court below that he was deprived of his right because the court refused to submit to the jury the question of whether or not he was employed at the time without which the charge of negligence could not be sustained. The court below held that when the facts were undisputed, it was a question of law as to whether or not he was employed and not a matter for decision by the jury, or one as to which juries could reach different conclusions. This decision was supported by authority from the Federal courts, to wit:

> "Where there was no dispute as to any material fact in action under Federal Employer's Liability Act, whether employee at time of accident was then engaged in his employment with defendant railroad was a question of law. Federal Employer's Liability Act, Sec. 1, et seq., 45 USCA, Sec. 51, et seq."
>
> **Quirk v. New York C. & St. L. R. Co., 189 Fed. 2d 97.**

There was, therefore, no denial of a right to trial by jury to petitioner.

Petitioner complains that the Supreme Court of Mississippi has always given a restricted interpretation of the coverage of the Federal Employer's Liability Act as to engagement in interstate commerce and cites two cases, **Gulf, M. & N. R. R. Co. v. Myer, 143 Miss. 555, 110 So. 444**, and **James E. Hill v. Gulf, Mobile & Ohio R. R. Co., 120 So. 2d 151**, decided by the Supreme Court of Mississippi, neither of which has any bearing on this case.

In the Myer case, 110 So. 444, prior to the amendment of 1939, the court held that that case was not covered by the Federal Employer's Liability Act, being urged so to

do by the plaintiff himself in order to escape the bar of the statute of limitations under the Federal Employer's Liability Act. The Hill case, supra, was decided since this instant case and whether right or wrong could have no bearing on the decision of this case prior thereto.

Second: Petitioner claims in this ground that the decision of the Supreme Court of Mississippi is contrary to the opinions of the various United States Courts of Appeal, but fails to cite any cases to which it is contrary. The Supreme Court of Mississippi distinguished the case of **Atlantic Coastline Railroad Company v. Craven, 185 Fed. 2d 176,** and showed that in that case the employee was still in the discharge of duty. In the case of **Healy v. Pennsylvania Railroad Company, 184 Fed. 2d 209,** cited in this section, the facts in that case show that it was entirely unlike the present case in that there the employee had been transported to the place of the accident by the defendant and was being paid for his time and was engaged in business to which he was directed by the railroad company, and the negligence alleged is from being struck by a train and not from failure to furnish a safe place to work. The court held there was no negligence shown.

In the case of **Chicago, M. St. P. & T. Railroad Company v. Kane, 33 Fed. 2d 866,** the employee was injured in the railroad yards coming from quarters in which he had been housed by the railroad company and was crossing the railroad yards and struck by an engine of the railroad company. This case was distinguished by the Supreme Court of Mississippi in that it was one in which the employee was housed on premises furnished by the railroad company and in which case the court said the relationship continued to exist.

Likewise, the court distinguished the case of **Mostyn v. Delaware L. & W. Railroad Company, 160 Fed. 2d 15,** and

placed it in the category of those cases in which the railroad company provided quarters for the employees and in which the court said it is no longer doubted that, where such quarters are provided, the employee is under the protection of the law while staying in such quarters.

Third: Petitioner sets out that the decision in this case creates a conflict between it and decisions of the United States Supreme Court but fails to set out any of the decisions with which he claims it is in conflict. He cites the case of **North Carolina Railroad Company v. Zachery, 232 U. S. 348,** but fails to show any conflict. The Supreme Court of Mississippi referred to this case in its opinion as showing that its decision was in accord with that case. Petitioner conceded that the two cases cited on this ground were of dissimilar facts and claims that there should be a liberal interpretation of the law to include employees under the act. That the Supreme Court of Mississippi did give liberal interpretation of the act is shown by the language of the court in its opinion as follows:

> "It is no longer doubted that the Employers Liability Act extends to and covers not only the actual work performed in interstate commerce, but those acts which can be said to be necessarily incident thereto. Thus, an employee is working in commerce while going to and from his actual place of work after reporting to duty. Lukon v. Pennsylvania R. Co., 131 Fed. 2d 327. And the act covers temporary departure from his line or course of duty as where a fireman, after oiling, firing and preparing his engine for an interstate journey temporarily left his engine to go to his nearby boarding house and was struck while on the railroad premises. North Carolina R. R. Co. v. Zachery, 232 U. S. 248." (Opinion Appendix A)

While the court has placed under coverage of the act the time required by the employee to leave the premises for his home, or place of abode, or temporary absence, while

in line of duty in employment, in this case, the petitioner had left the premises of the defendant, signed out as off duty as an employee, taken up his quarters in a private place off of the premises of the railroad company, eaten his breakfast, and spent two hours, or more, reading the paper and sitting around, during all of which time, according to his contention, the petitioner would be in the service of the defendant and under the act, although he had been discharged from duty and left the premises of the defendant and was not subject to call for eight hours.

Fourth: Under this ground, petitioner claims the writ of certiorari should be granted because there has arisen through the years a conflict of decisions of the highest courts of the states on the Federal question involved and cites in this section only decisions from the Supreme Courts of states. According to the rules of this court, the writ of certiorari is not a matter of right but of sound discretion and will be granted only where there are special and important reasons therefor. We do not conceive that the fact there are differences between the decisions of the various states constitutes special and important reasons for this court to review this case. There have always been differences between the decisions of the various states on questions of law, but it is not the function of this court to reconcile the differences of the state courts. It is only when the decisions of the state courts are in conflict with the decisions of this court that the matter may be considered. We do not think it is important that we discuss the state court decisions cited under this section of the petition other than the case of **Hill v. Gulf, Mobile & Ohio Railroad Company, 120 So. 2d 157**, decided by the Supreme Court of Mississippi after the decision by it of the case now before this court for certiorari. If that case was decided erroneously, petitioner's remedy is application for certiorari in that case and not undertaking to get a collateral review of it through this case. It is not a case which is in conflict with the decisions of the court in this case, but in

accord with it, and in fact, the court cited this case as authority in that case. In that case, there was a claim of liability for failure to provide a safe place to work. The court held that such ground was not tenable because neither of the parties involved were employed by the railroad company at the time in question. This fourth ground is without the support of any authority upon which to base this contention. It rests on a misconception of the basis of liability in this case, if there be any. It is his contention that the Federal Employer's Liability Act should be the law to govern a case of this kind. The court did not deny to petitioner any benefits under the Federal Employer's Liability Act but tried it as if the law of that act governed. The basis of all liability is negligence and what is negligence under the Federal Employer's Liability Act is what is negligence under the common law except in certain specified cases in regard to safety appliances, etc., none of which are involved in this case. Petitioner says he bases his claim on failure of the defendant to furnish a safe place to work. What the court decided was that he was not employed by the defendant, had no work to do, no duty to perform and therefore, there was no obligation on the part of the defendant to furnish a safe place to work when there was no work. It is admitted by all parties that he was off duty at the time. He stated that he would have no further duties until he was called back to take another train. There is no duty to furnish a safe place to work when there is no work to be done and, therefore, no need of a safe place. Petitioner was given full benefit of the Federal Employer's Liability Act in both the trial court and in the Supreme Court. Both courts considered the facts on the basis of the Federal Employer's Liability Act and the liability imposed by it. Both courts tried the case as it under the Federal Employer's Liability Act and gave petitioner benefit of all that might be had under it and his case failed to meet the test of liability because there was no obligation of the defendant

ant to furnish him a safe place in which to work when he was not on duty and had no work to do.

Fifth: This ground presents no matter of law and is one of expediency and could be more properly presented before Congress if the relief he asks should be granted than before this court which acts according to the law as written. The statements made do not present the situation in accordance with the record in this case. Nothing in this ground gives any support for the foundation of this case which he states in his brief was failure to furnish a safe place in which to work.

Sixth: This contention is untenable for the reason that the court has held that certiorari will not be granted merely to give relief to the individual concerned. This contention is that he will lose the damages which he has suffered. This is purely a personal matter, does not furnish special and important reasons and concerns only the petitioner himself and the court will not grant certiorari according to the rules merely for the relief of the litigant.

CONCLUSION.

The granting of certiorari and review of this case by this court would amount only to a second hearing on the facts of the case and would add nothing to the applicable law. It would involve no question peculiar to Federal law. Any decision on the law different from that of the Supreme Court of Mississippi would be in conflict with the former and established decisions of this court. The case of Garcia v. Atchison, Topeka and Santa Fe Ry. Co., 66 N. M. 329, 347 P. 2d 1065, in the Supreme Court of New Mexico, was very similar to the instant case, and was decided against the employee on directed verdict. This Court denied certiorari in that case on [illegible], 1977. There are no special and important reasons for granting the writ.

Wherefore, respondent respectfully submits that petitioner is not entitled to have this cause reviewed again.

and that his petition for writ of certiorari to the Supreme Court of Mississippi should be denied.

Respectfully submitted,

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St. Louis, Missouri.

Certificate of Proof of Service.

I, C. R. Bolton, attorney for the respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I received copy of the petition for writ of certiorari on July 26, 1960, and I am this day serving copies of the above and foregoing brief in opposition to the said petition by mailing same in properly addressed envelopes with first class postage prepaid to Honorable Frank E. Everett, Jr., Counsel for Petitioner, First National Bank Building, Vicksburg, Mississippi; Honorable James B. Ramsey, Attorney, First National Bank Building, Vicksburg, Mississippi, and Honorable Sam H. Long, Attorney, Tupelo, Mississippi.

This the 24th day of August, 1960.

C. R. Bolton,
Tupelo, Mississippi,
Attorney for Respondent.

APPENDIX A.

In the Supreme Court of Mississippi.

No. 41,341.

James O. Wallace

vs.

St. Louis-San Francisco Railway Company.

Kyle, Justice:

The appellant, James O. Wallace, sued the appellee, the St. Louis-San Francisco Railway Company, under the Federal Employers' Liability Act, for damages for personal injuries alleged to have been sustained by the appellant while engaged in the performance of his duties as an employee of the defendant on October 26, 1956.

The plaintiff alleged in his declaration that the defendant on that date was engaged in the furtherance of interstate commerce in the movement of freight by rail from the State of Mississippi to other states; that the plaintiff was employed as a brakeman on the defendant's railroad between Amory, Mississippi, and Memphis, Tennessee, and as such brakeman, was required to use certain paths on the defendant's railroad yards in Memphis, in going to and from his work; that, while plaintiff was using such pathway provided by the defendant in its yards, going to the washroom provided by the defendant to wash up, plaintiff found that the defendant had negligently allowed and permitted several of its freight trains or long strings of cars to remain standing on the railroad tracks in said yards, blocking the crossing and preventing the use by the defendant's employees of the pathway to go to said washroom; that the plaintiff found it necessary to cross over between said cars, and while

doing so slipped and fell by reason of the dangerous hazardous condition aforesaid, and permanently injured his back. The plaintiff alleged that the defendant was negligent in that it failed to exercise reasonable care to furnish the plaintiff with a safe place to work, which included incidental passage to and from the bathhouse provided for the use of the plaintiff and other employees; that the defendant violated its duty and its own rules of operation in negligently permitting the pathway provided by the defendant across its yards to become and remain blocked for a long period of time by trains or cuts of cars, thus preventing the proper and safe use of said passageway; and that the defendant's negligence in permitting said pathway to become and remain blocked was the proximate cause of plaintiff's slipping and falling.

The defendant in its answer denied that the plaintiff at the time of his injury was an employee of the defendant or was engaged in the furtherance of interstate commerce in the movement of freight by rail; and the defendant denied the other material allegations of the declaration. The defendant in its answer averred that the plaintiff was off duty and not in the service of the defendant at the time of the alleged accident. The defendant also averred that the plaintiff was guilty of gross negligence in climbing over or crossing through the alleged cut of box-car cars, and in selecting the way of returning from the Yale Hotel to the wash or locker rooms on the railroad yard, and that the gross negligence of the plaintiff was the direct and proximate cause of the plaintiff's injury.

The plaintiff testified that he lived in Amory, Mississippi, and had been an employee of the St. Louis-San Francisco Railway Company for a period of approximately 20 years. On October 26, 1956, he was on the posting as brakeman on a freight train which ran from Amory to Memphis, Tennessee, a distance of 96 miles. The conductor on the train was J. L. Duval;

also lived at Amory. The train left Amory at four o'clock A. M. and arrived at the Yale Yards in Memphis about 6½ hours later. The plaintiff and the conductor got off the train and went to the yard office, climbing over a cut of cars to get to the office. The members of the crew tied up the train and completed the active labor about 9:30 A. M. The plaintiff went immediately to the yard office and registered in the "time book" or register provided by the defendant, and reported his "tie up time." After the plaintiff had registered on the "time book" he left the office and went to the Yale Hotel, off the railroad yard on Trezevant Avenue, and registered for a room. There was a cinder path from the yard office to the street leading to the Yale Hotel which was used by the employees. When plaintiff left the yard office to go to the hotel this path was blocked by cuts of cars on three tracks and plaintiff climbed through three cuts of cars to reach the hotel, but this occurred without incident. After registering at the hotel for a room the plaintiff ate breakfast, sat down and read the morning paper, and finally walked outside to see if the cars that were blocking the walkway had been moved. About 12:15 P. M. the plaintiff decided to return to the washroom on the railroad yard to shave and check with the call boy as to when he might be used and also check the bulletin board. He climbed over the cut of cars on the south beyond the main line, on the No. 1 track, and was attempting to cross the cars on the No. 2 track, when he slipped and fell. There was no crossover of the cars when the plaintiff slipped and fell. The plaintiff then described in detail his injuries and the hospital and medical treatment which he had undergone as a result of his injuries.

On cross-examination, the plaintiff stated that he and the conductor signed out between 9:30 and 10:00 o'clock, and he had no further duties to perform in connection with the train. His next duties would be when he was

called to take another train. The plaintiff stated that when he signed the register at the yard office, he showed that he would be at the Yale Hotel. He was not supposed to be called back under eight hours. He was "on his own" until the call boy called him back; but he was supposed to be ready for another assignment on short notice.

J. L. Duval, who testified as a witness for the plaintiff, testified that after the trainmen signed the register at the end of a run they were free to go to their places of lodging, and were subject to no further duties until they were called. According to an agreement between the railroad and the Brotherhood, they would not be called prior to eight hours unless there was an emergency due to a wreck or a washout. After a trainman got off the yard he was "on his own", until notified by the call boy to report back to work. He must then have one hour and forty minutes notice. He was supposed to familiarize himself with the circulars and bulletins before the beginning of each trip. The rule required that he do that; but that was usually done just before the train pulled out. Duval stated that a trainman had no occasion for having to look at the bulletin board to see when he was going out, except for his own personal plans. A trainman was not required to go to the caller's office and look at the bulletin board to get his name on the list to be called.

At the close of plaintiff's case the defendant made a motion for a peremptory instruction on the ground that the plaintiff's evidence showed that the plaintiff was off duty at the time of the accident and had left the defendant's premises, and that the defendant was under no duty to furnish him a safe place to work because he had no work to do. The court sustained the motion and directed a verdict for the defendant, and judgment was entered thereon. From the judgment the plaintiff has prosecuted this appeal.

The Federal Employers' Liability Act, as amended by the Act of August 11, 1939, 45 U. S. C. A., Sec. 51 et seq., provides in part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

It is fundamental that the interpretation of this act is a matter of federal law and that federal decisions are controlling. **Urie v. Thompson**, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282.

The first point argued by the appellant's attorneys as ground for reversal of the judgment of the lower court is that the court erred in sustaining the appellee's motion for a directed verdict and refusing to submit to the jury the question of whether or not the plaintiff was employed in interstate commerce at the time of the accident in question.

But we think there was no error in the court's refusal to submit to the jury the question of whether or not the

plaintiff was employed in interstate commerce at the time of his injury. There was no dispute as to any material fact; and we agree with the court below that the question for decision is one of law. **Quirk v. New York, C. & St. L. R. Co.** (C. C. A. 7th, 1951), 189 F. 2d 97. From the testimony of the plaintiff and the plaintiff's witness, J. L. Duval, it seems clear to us that the plaintiff's injury did not arise out of his interstate activities or the performance of any duties in furtherance of interstate commerce. The activity undertaken by the appellant, when he returned to the railroad yard at 12:15 P. M., was an activity undertaken for a purely private purpose. The appellant was performing at the time no duties as an employee "in furtherance of interstate or foreign commerce." He was engaged in no activity which, "in any way directly or closely and substantially," affected such commerce. He was performing no service for his employer. He was neither going to nor coming from the job at the time of his injury. He was neither engaged in rendering actual service to the railroad company, nor in doing the things necessarily incident thereto.

It is no longer doubted that the Employers' Liability Act extends to and covers not only the actual work performed in interstate commerce, but those acts which can be said to be necessarily incident thereto. Thus, an employee is working in commerce while going to and from his actual place of work after reporting for duty. **Lukon v. Pennsylvania R. Co.** (C. C. A. 3rd, 1942), 131 F. 2d 27. And, the act covers temporary departures from his line of course of duty, as where a fireman, after oiling, firing and preparing his engine for an interstate journey, temporarily left his engine to go to his nearby boarding house and was struck while on the railroad premises. **North Carolina R. R. Co. v. Zachary**, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. But, given its most liberal interpretation, the act cannot be extended to cover activities

not necessarily incident or of an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment. **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1934), 74 F. 2d 251; **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1935), 79 F. 2d 844; **Sassaman v. Pennsylvania R. Co.** (C. C. A. 3d 1944), 144 F. 2d 161; **Quirk v. New York, C. & St. L. R. Co.**, supra.

It is argued, however, on behalf of the appellant that, although the nature of the activity in which he was engaged at the time of his injury may have partaken of the character of a personal mission of his own, the activity was of such nature as might properly be deemed to have been incident to his duties in interstate commerce. But that argument is, in our opinion, wholly untenable, and finds no support in the authorities cited by the appellant's attorneys in their brief.

The appellant in this case, as in **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1934), 74 F. 2d 251, had ceased working two hours before the accident occurred, as a result of which he suffered his injury. His pay had ended. He had no further duties to perform until called to brake another train; and he was not supposed to be called again under eight hours, unless there was an emergency, that is to say, a wreck or a washout. The appellant, at the time of his injury, according to his own testimony, was returning to the railroad washroom to shave. As stated by the Court in the **Young** case, in commenting on the plaintiff's wish to go by Cedar Hill to change his clothes, "Certainly the defendant had no conceivable interest in this * * *." The opinion in the **Young** case was written by Judge Learned Hand; and in the later case of **Mostyn v. Delaware L. & W. R. Co.** (C. C. A. 2d 1947), 160 F. 2d 15, which was decided several years after the enactment of the 1939 amendment to the Federal Em-

ployers' Liability Act, Judge Hand said: "We hold, as we did in **Young v. New York, N. H. & H. R. Co.**, supra, that any activity undertaken by an employee for a private purpose is certainly not within his employment." See also **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1935), 79 F. 2d 844; **Quirk v. New York, C. & St. L. R. Co.**, supra; **Atchison, T. & S. F. R. Co. v. Wottle** (C. C. A. 10, 1952), 193 F. 2d 628.

This case is entirely unlike the case of **Atlantic Coast Line Railroad Co. v. Craven** (C. C. A. 4th 1950), 185 F. 2d 176, cited in the appellant's brief, in which the brakeman, having been led to believe that he was required to report to his conductor as soon as possible after putting the engine away at the completion of an interstate trip, left the railroad yard in an attempt to make such report and was injured while attempting to return to the railroad washroom. This case is also entirely unlike the cases of **Atlantic Coast Line R. R. Co. v. Meeks**, 1947, 30 Tenn. App. 520, 208 S. W. 2d 355; **Mostyn v. Delaware L. & W. R. Co.** (C. C. A. 2d 1947), 160 F. 2d 15; and **Casso v. Pennsylvania R. Co.** (C. C. A. 3rd 1955), 219 F. 2d 303, in which the injured employees were section hands or track workers housed in shanties or bunk cars furnished by the employers and subject to call when not actually in service.

A summary of the decisional law on the points presented for consideration by us on this appeal is stated by the textwriter in 35 Am. Jur., 861, Master and Servant, par. 445, as follows: "An employee whose regular service is a part of interstate commerce is within the protection of the Federal Employers' Liability Act while traveling on the company's property to begin his work, while awaiting the actual work time to begin after reaching the place to which he has been assigned, and while leaving the company's property on his way home, after his interstate work is completed. Also, if the work in which the employee is engaged is interstate commerce, he is pro-

tected while going from one job to another. In any case however, the work in which the employee was to engage must be shown to be interstate commerce; there can be no recovery if the employee was using the yards or tracks for purposes of his own, unless such use is so incidental to his employment that it can be regarded as a part thereof."

We think it is clear from the testimony of the appellant and his witness, J. L. Duval, that the appellant in this case was not acting within the scope of his employment at the time he received his injuries, and that the appellant's use of the railroad yards and tracks at that time was not so incidental to his employment that it can be regarded as a part thereof. We must therefore hold that the appellant was not employed in interstate commerce at that time, and that the appellant did not have a right of action under the Federal Employers' Liability Act at the time the suit was filed. Cf. **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1934), 74 F. 2d 251; **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1935), 79 F. 2d 844; **Bishop v. Delano** (C. C. A. 7th), 265 F. 263, certiorari denied, 254 U. S. 632, 41 S. Ct. 7, 65 L. Ed. 448; **Sassaman v. Pennsylvania R. Co.**, supra.

The judgment of the lower court is therefore affirmed.

Affirmed.

All Justices Concur Except Roberds, J., Who Took No Part.